Supreme Court, U.S.
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No. 96-1329

In The

Supreme Court of the United States

October Term, 1996

MICHAEL LIGHTMAN, an individual, *et al.*,

Petitioners,

vs.

ZENITH INSURANCE COMPANY, a California corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court below erred in holding that Respondent's RICO claims are not preempted by California law under the McCarran-Ferguson Act.

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Respondent Zenith Insurance Company respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the Ninth Circuit Court of Appeals in this case. The opinion of the Ninth Circuit Court of Appeals is unreported and is reprinted as Appendix A to the petition.

STATEMENT OF THE CASE

A. Facts Material To The Consideration Of The Question Presented.

Petitioners' Statement of the Case attempts to minimize their roles in the conduct of the affairs of an association-in-fact RICO enterprise, and the nature and scope of their conspiracy and pattern of racketeering activity, by describing Respondent's Complaint as one "to recover alleged overpayments it made on 45 workers' compensation claims" due to "fraudulent billings."

As described in Respondent's Complaint (E.R. 1)[1] and RICO Case Statement (E.R. 9 and 10), Petitioners conspired together and operated and conducted a RICO enterprise to commit mail fraud through the creation, submission to Respondent and prosecution of fraudulent claims for workers' compensation benefits and related bills and requests for liens for medical and legal services purportedly rendered to workers.

The association-in-fact enterprise, comprised of Petitioners James W. Eisenberg Medical Corporation, Robert Yale Libott, a law corporation, Excalibur Ventures, Inc. and Lien Collections, Inc. operated to attract workers to file claims against their

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1. "E.R. 1" refers to Exhibit 1 of the consecutively numbered exhibits in the Excerpts of Record on Appeal filed with the court below. Where appropriate, page citations are included after exhibit numbers.

employers and to fraudulently inflate the claims and related bills and requests for liens for medical and legal services purportedly rendered. Workers were unlawfully solicited from unemployment lines and through media ads. Workers who responded to the solicitation were induced to file claims regardless of whether the workers had legitimate injuries. The workers also were sent for treatment and medical-legal evaluation and referred to an affiliate for CT scans, MRIs and other diagnostic studies. Petitioners Michael Lightman and Excalibur Ventures, Inc. managed the daily operations of the medical clinics and law offices and mailed to Respondent, as the insurer for the workers' employers, claims by the workers and bills and lien requests for medical and legal services. Petitioner Lien Collections, Inc. prosecuted and collected the bills and lien requests. (E.R. 9, p. 521, l. 17 – p. 528, l. 2).

Petitioners' fraudulent inflation and exaggeration of claims, bills and lien requests occurred in several ways. Petitioners deliberately and fraudulently abused the Relative Value Scale codes established in California's Official Medical Fee Schedule to misrepresent to Respondent the nature, extent and value of medical services provided to workers and thereby inflate medical bills and lien requests.

Other schemes used by Petitioners to defraud Respondent included: (i) increasing bills to pay physicians unlawful kickbacks for prescribing unnecessary treatment (E.R. 9, p. 513, l. 1 – p. 515, l. 14); (ii) inflating bills and liens to disguise the payment of illegal kickbacks and referral fees (E.R. 9, p. 515, l. 16 – p. 516, l. 28); (iii) misrepresenting that services were medical-legal and thereby substantially inflating the amount billed for the services (E.R. 9, p. 517, l.4 – p. 518, l. 15); (iv) misrepresenting that a physician was a "treating physician" (E.R. 9, p. 518, l. 17 – p. 519, l. 11); and (v) inducing workers who did not have industrial injuries to file fraudulent workers'

compensation claims and billing for medical and medical-legal services to the worker (E.R. 9, p. 519, l. 13 – p. 521, l. 15).

B. Course Of Proceedings And Disposition Of The Case Below.

On June 14, 1994, after staying the action for more than one year during which, at the District Court's direction, the parties briefed such issues as the constitutionality and status of civil RICO, abstention and the McCarran-Ferguson Act, the District Court dismissed Respondent's RICO claims. (E.R. 24, p. 1051). The basis for the dismissal was the District Court's belief that mail fraud against an insurer constitutes the "business of insurance" and therefore is preempted by the McCarran-Ferguson Act. (E.R. 24, p. 1051).

In reversing the judgment of dismissal, the court below did not reach three of the four prongs of the test for determining whether the McCarran-Ferguson Act preempts a federal statute. Rather, finding that "[t]his case is squarely controlled by" *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1492 (9th Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 418, 133 L. Ed. 2d 335 (1995), the court below held that Respondent's RICO claims do not meet the fourth prong of the McCarran-Ferguson Act because RICO does not invalidate, impair or supersede California law "proscribing identical conduct" even if RICO and the state law do not provide the same remedies.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS HAVE MISSTATED CALIFORNIA LAW IN AN EFFORT TO MANUFACTURE THE APPEARANCE OF A CONFLICT WITH THE COURT BELOW'S DECISION.

The principal reason advocated by Petitioners as the basis for granting certiorari, the purported conflict between the decision of the court below and California law, has been manufactured by Petitioners through their gross misstatement of California law relating to the nature and scope of the exclusive jurisdiction of the Workers' Compensation Appeals Board (the "WCAB").

The petition is founded upon the premise that California law vests the WCAB with exclusive jurisdiction over all tort claims by an insurer relating to workers' compensation fraud. This premise is false. Subject to various exceptions, California's legislature has conferred upon the WCAB exclusive jurisdiction over claims *against* an insurer "for the recovery of compensation, or concerning any right or liability arising out of or incidental thereto." However, the converse is not true. There is no exclusive jurisdiction over clams by an insurer against persons like the Petitioners in this case. Cal. Lab. Code §§ 5300, 5302 and 5304; *Shoemaker v. Myers*, 52 Cal. 3d 1, 13-17, 801 P.2d 1054, 1060-63, 276 Cal. Rptr. 303 (1990); *Marsh & McLennan, Inc. v. Superior Court*, 49 Cal. 3d 1, 10-11, 774 P.2d 762, 259 Cal. Rptr. 733 (1989); *Mitchell v. Scott Wetzel Services, Inc.*, 227 Cal. App. 3d 1474, 1479, 1482, 278 Cal. Rptr. 474, 476, 478-79 (1991); *Stoddard v. Western Employers Ins. Co.*, 200 Cal. App. 3d 165, 171-72, 245 Cal. Rptr. 820, 823-25 (1988), *review den.*, (1988) *Santiago v. Employee Benefits Services*, 168 Cal. App. 3d 898, 214 Cal. Rptr. 679 (1985).

The fallacy of Petitioners' premise is apparent from the fact that, with one exception, the cases cited in support of their argument address whether the WCAB has exclusive jurisdiction over claims *against* an insurer. *See Marsh & McLennan, Inc. v. Superior Court*, 49 Cal. 3d at 5, 774 Cal. Rptr. at 763 (worker sued insurer for fraud, intentional infliction of emotional distress and breach of fiduciary duties with respect to claim for benefits); *Unruh v. Truck Ins. Exchange*, 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972) (worker sued insurer for intentional infliction of emotional distress in retaining investigator who began romantic relationship as a ruse to investigate her claim); *Mitchell v. Scott Wetzel Services, Inc.*, 227 Cal. App. 3d at 1479 and 1482, 278 Cal. Rptr. at 476 and 478-79 (worker sued insurer for alleged misrepresentations and perjury before the WCAB); *Everfield v. State Comp. Ins. Fund*, 115 Cal. App. 3d 15, 21, 171 Cal. Rptr. 164, 166 (1981) (worker sued insurer for alleged fraudulent, deceitful and intentional refusal to pay benefits).[2]

Petitioners cite only a single *non-RICO* case suggesting that the WCAB has exclusive jurisdiction over common law fraud claims against *physicians* (but *not* attorneys, management companies or collection services),[3] *American International Adjustment Co., Inc. v. Crawford*, 51 Cal. App. 4th 1489, 60

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2. Contrary to Petitioners' description of *American Psychometric Consultants, Inc. v. Workers' Compensation Appeals Bd.*, 36 Cal. App. 4th 1626, 43 Cal. Rptr. 2d 254 (1995), *reh'g denied, review denied,* (1995), as a case which "addressed the issue of whether the type of relief sought by Zenith herein could be claimed apart from California's workers' compensation system" (Petition at p. 9), the opinion examined and reversed decisions by the WCAB.

3. Generally, attorneys, managers and collection services such as Petitioners are strangers to the presumed compensation bargain underlying the Workers' Compensation Act and the exclusive jurisdiction doctrine. *Shoemaker v. Myers*, 52 Cal. 3d at 15-16, 801 P.2d at 1062-63.

Cal. Rptr. 2d 123 (1997), *reh'g denied, review granted,* 97 Daily Journal D.A.R. 5576 (April 30, 1997) (S059135). However, on April 30, 1997, the California Supreme Court granted review in *American International Adjustment Co., Inc. v. Crawford,* 51 Cal. App. 4th 1489, 60 Cal. Rptr. 2d 123, and vacated the Court of Appeal decision. Thus, Petitioners cannot cite even this one opinion.

Nor does the decision of the court below create a conflict with *American International Group, Inc. v. Superior Court,* 234 Cal. App. 3d 749, 767-68, 285 Cal. Rptr. 765, 776-77 (1991), *reh'g denied, review denied,* (1991), which would justify granting certiorari.

In *American International Group, Inc.* a California Court of Appeal found McCarran-Ferguson preemption on the theory that RICO would circumvent recent California Supreme Court holdings rejecting an insurer's liability to third-parties under Insurance Code § 790.03(h). *American International Group, Inc. v. Superior Court,* 234 Cal. App. 3d at 767-68, 285 Cal. Rptr. at 776-77. Unlike *American International Group, Inc.*, in this case RICO confers equal liability for conduct also proscribed by state law; the difference between federal and state law lies in the remedies available for their violation.

Moreover, the issue later determined in *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1492 (9th Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 418, 133 L. Ed. 2d 335 (1995), and applied by the court below, "the question of exactly when a federal statute 'invalidate[s], impair[s] or supersede[s]' a state law under § 2(b)" of the McCarran-Ferguson Act, is purely a question of federal law to be determined by federal, rather than state, courts. To the extent that the California Court of Appeal in *American International Group, Inc. v. Superior Court,* 234 Cal. App. 3d 749, opined on what then was

an open question of federal law in the Ninth Circuit, *American International Group, Inc.* has been superseded by *Merchants Home Delivery Serv., Inc.*, 50 F.3d 1486. There is no California opinion subsequent to *Merchants Home Delivery Serv., Inc.*, 50 F.3d 1486, suggesting that California's appellate courts will not follow *Merchants Home Delivery Serv., Inc.'s* holding that RICO is not preempted by state law.

Petitioners' claim of a conflict between the court below's decision and California law, like their prediction that the decision will generate a forum shopping frenzy by insurers which threatens the fabric of the workers' compensation system, is a fallacy. There is not a single California case holding that a RICO claim by an insurer against physicians, attorneys, their managers or collection services is within the exclusive jurisdiction of the WCAB. Nor is there a single California case holding that such a RICO claim would not fall within one or more of the various recognized exceptions to the WCAB's exclusive jurisdiction. The petition is founded upon a false premise and should be denied.

II.

THE DECISION OF THE COURT BELOW IS CONSISTENT WITH THE APPLICATION OF THE McCARRAN-FERGUSON ACT BY OTHER UNITED STATES COURTS OF APPEALS.

Petitioners also attempt to manufacture the appearance of a conflict between the decision of the court below and the decisions of other United States Courts of Appeals over when a federal statute invalidates, impairs or supersedes a state law under the McCarran-Ferguson Act. Petitioners reflexively cry conflict merely because another court found that RICO was preempted by state law. The obvious flaw with Petitioners'

simplistic approach is that it ignores the extremely fact intensive inquiry required to determine whether a specific state statute would be invalidated, impaired or superseded by the application of RICO.

In finding Respondent's RICO claims are not subject to McCarran-Ferguson preemption, the court below ruled that "[t]his case is squarely controlled by" its holding in *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d at 1492, that a federal law providing for a private right of action does not "invalidate, impair or supersede" state law when it prohibits acts which also are prohibited under state insurance law even if it affords remedies not available under that state law. *See also Forsyth v. Humana, Inc.*, 99 F.3d 1504, 1516 (9th Cir. 1996).

The court below's application of the "invalidate, impair or supersede" prong of the McCarran-Ferguson Act in this case, *Forsyth v. Humana, Inc.*, 99 F. 3d 1504, and *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, is consistent with decisions by the Eighth Circuit in *Murff v. Professional Medical Ins. Co.*, 97 F.3d 289, 292 (8th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3572 (U.S. February 10, 1997) (No. 96-1252), the First Circuit in *Villafane-Neriz v. F.D.I.C.*, 75 F.3d 727, 735-36 (1st Cir. 1996), *amended, reh'g denied*, (1996), the Sixth Circuit in *Nationwide Mutual Ins. Co. v. Cisneros*, 52 F.3d 1351 (6th Cir. 1995), *reh'g, en banc, denied*, (1995), *mot. granted, cert. denied*, (1996), the Seventh Circuit in *N.A.A.C.P. v. American Family Mut. Ins. Co.*, 978 F.2d 287, 294-95 (7th Cir. 1992), *reh'g, en banc, denied*, (1992), *cert. denied*, 508 U.S. 907, 113 S. Ct. 2335, 124 L. Ed. 247 (1993), and the Fourth Circuit in *Mackey v. Nationwide Ins. Companies*, 724 F.2d 419, 420-21 (4th Cir. 1984).

The only appellate opinion cited by Petitioners which even

arguably is in conflict with the decision of the court below is *Kenty v. Bank One, Columbus, N.A.*, 92 F.3d 384, 392 (6th Cir. 1996), *reh'g, en banc, denied,* (1996) and *reh'g, en banc, denied,* (1996).[4] Close examination of *Kenty* shows that the purported conflict is entirely illusory.

Kenty, 92 F.3d 384, examined an order granting summary judgment in favor of defendants on a RICO claim alleging mail fraud in the defendant bank's requirement that borrowers purchase casualty insurance issued by the defendant insurer as a prerequisite to the bank granting car loans. The Sixth Circuit affirmed, finding that the plaintiffs had failed to provide evidence of a material false statement sufficient to raise a triable issue of fact. *Kenty v. Bank One, Columbus, N.A.*, 92 F.3d at 391.

In *dicta*, the *Kenty* court also found that the RICO claim was preempted under the McCarran-Ferguson Act because it would *substantively* impair or supersede Ohio law by creating federal liability for conduct which, under several specific Ohio insurance statutes, would not give rise to liability:

> By holding insurance companies liable under a federal law, such as RICO, when Ohio law

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4. Petitioners' argument that the decision of the court below conflicts with earlier District Court opinions is frivolous. *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, represents the first time that the court below addressed "the question of exactly when a federal statute 'invalidate[s], impair[s] or supersede[s] a state law' " under the McCarran-Ferguson Act. 50 F.3d at 1492. The fact that a District Court came to the opposite conclusion before the court below considered the issue obviously does not create a conflict. Similarly, the Eastern District of Virginia opinion cited by Petitioners, *Ambrose v. Blue Cross & Blue Shield of Virginia*, 891 F. Supp. 1153 (E.D. Va. 1995), *aff'd without op.*, 95 F.3d 41 (4th Cir. 1996), does not create a conflict. The controlling Fourth Circuit opinion, *Mackey v. Nationwide Ins. Companies*, 724 F.2d 419, 420-21, is consistent with the court below's decision.

> provides for no liability, RICO would impair the regulatory framework within which Ohio expects its insurance companies to do business.

Kenty v. Bank One, Columbus, N.A., 92 F.3d at 392.

Petitioners' inaccurate characterization of *Kenty*'s *dicta* as conflicting with the decision below ignores the steps taken by the Sixth Circuit to limit the opinion to the specific facts before it. In limiting *Kenty* to the factual scenario in which RICO *substantively* impairs or supersedes several specific statutes by employing different standards of liability and proof, the Sixth Circuit carefully reaffirmed and distinguished its previous decision in *Nationwide Mutual Ins. Co. v. Cisneros*, 52 F.3d 1351, that "allowing additional procedural means, such as jury trials or punitive damages, could not be said to be impairing or superseding" state law which afforded only administrative remedies and did not allow a private right of action. *Kenty v. Bank One, Columbus, N.A.*, 92 F.3d at 392. Significantly, in reaching its decision in *Nationwide Mutual Ins. Co.*, the Sixth Circuit approved and relied upon the holding in *Merchants Home Delivery Serv., Inc.*; *American Family Mut. Ins. Co.* and *Mackey*, that "the presence of additional remedies in the" federal law being examined does not cause the federal law "to invalidate, impair or supersede [state] insurance law." *Nationwide Mutual Ins. Co. v. Cisneros*, 52 F.3d at 1363.

The court below's decision does not conflict with *Kenty* because in this case RICO confers equal liability for conduct also proscribed by state law. As in *Nationwide Mutual Ins. Co.*, any difference between RICO and California law lies in the available remedies for their violation.[5] *Kenty* recognizes that

5. The WCAB is empowered to order physicians to make restitution (Cont'd)

such differences in remedies are "additional procedural means" which "could not be said to be impairing or superseding" state law. *Kenty v. Bank One, Columbus, N.A.*, 92 F.3d at 392.

Similarly, the decision below does not conflict with a recent case not cited by Petitioners, *Doe v. Norwest Bank Minnesota, N.A.*, 107 F.3d 1297, 1306-08 (8th Cir. 1997). In holding that applying RICO would so substantively affect the specific Minnesota statutes being examined that RICO "would frustrate, and perhaps even supplant" them, the Eighth Circuit in *Doe* distinguished *Murff v. Professional Medical Ins. Co.*, 97 F.3d 289, as involving, as does this action, laws "designed to protect parties other than the policyholders." 107 F.3d at 1308, n. 11. Unlike Petitioners, the Eighth Circuit recognized that simply because RICO may invalidate, impair or supersede a particular state insurance law under one specific set of facts does not mean that RICO necessarily would be found to invalidate, impair or supersede another state insurance law under a different set of facts.

To the extent that there may be tension between the Eighth Circuit's decision in *Doe v. Norwest Bank Minnesota, N.A.*, 107 F.3d 1297, and the Ninth Circuit's decisions in *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, and *Forsyth v. Humana, Inc.*, 99 F.3d 1504, such tension does not extend to the decision below. Unlike the scenario presented in *Doe*, 107 F.3d at 1306, in which the conduct attributed to the

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(Cont'd)
and to impose equitable relief for fraud. *American Psychometric Consultants, Inc. v. Workers' Compensation Appeals Bd.*, 36 Cal. App. 4th at 1646, 43 Cal. Rptr. 2d at 254. As discussed above, there is no California case which would preclude fraud based claims against physicians by a workers' compensation insurer and no California case at all which would preclude such claims against attorneys, medical and legal managers or lien collection services. Insurance Code § 1871.7 provides a qui tam private right of action for civil penalties for insurance fraud.

defendant bank fell "squarely within several sections of Minnesota's insurance law," most of the Petitioners here are attorneys, managers and collectors who are outside of the workers' compensation system. At least as to those Petitioners, *there is no California insurance statute which could be affected by the RICO claim.* Nor is there any California decision which would preclude Respondent from pursuing a state fraud based claim against them. Thus, the decision below does not create conflict with any United States Court of Appeals which would justify granting certiorari.

Moreover, even if any tension exists between *Doe* and *Merchants Home Delivery Serv., Inc.* and *Forsyth*, the petition should be denied because the court below correctly applied the McCarran-Ferguson Act's "invalidate, impair or supersede" prong. Interpreting the "invalidate, impair or supersede" prong as Petitioners urge would result in the application of different standards to principles governing state preemption of federal law under the McCarran-Ferguson Act than are applied to principles governing federal preemption of state law. *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d at 1492; *N.A.A.C.P. v. American Family Mut. Ins. Co.*, 978 F.2d at 296.

As observed by the court below in approving the Seventh Circuit's reasoning in *N.A.A.C.P. v. American Family Mut. Ins. Co.*, 978 F.2d at 296:

> In reaching its conclusion, the Seventh Circuit analogized to the principles governing *federal* preemption of *state* law in areas heavily regulated by federal statute. For example, in the area of nuclear power, despite pervasive federal regulation and a lower cap on liability under federal law, the

> Supreme Court upheld a state punitive damages award for acts prohibited by both state and federal law. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256, 104 S. Ct. 615, 624, 78 L. Ed. 2d 443 (1984). The Seventh Circuit went on to catalog many additional Supreme Court cases upholding cumulative state *remedies* for conduct deemed wrongful under both state and federal law.

Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co., 50 F.3d at 1492.

The decision below was correctly decided and does not conflict with the decision of any United States Court of Appeal. Accordingly, the petition should be denied.

III.

THE PETITION SHOULD BE DENIED BECAUSE THE DECISION BELOW WOULD BE AN INAPPROPRIATE VEHICLE FOR REVIEWING ANY PURPORTED DIFFERENCES IN THE APPLICATION OF THE McCARRAN-FERGUSON ACT.

There are at least two additional significant reasons why the court below's decision would be an inappropriate vehicle for reviewing any purported differences in the interpretation or application of the "invalidate, impair or supersede" prong of the McCarran-Ferguson Act.

Whether the court below properly applied the McCarran-Ferguson Act's "invalidate, impair or supersede" prong in reversing the District Court judgment obviously is irrelevant if

Respondent's RICO claims would not fall within the WCAB's exclusive jurisdiction under California law. There is not a single California case holding that a RICO claim by an insurer against physicians, attorneys, their managers or collection services is within the exclusive jurisdiction of the WCAB. Nor is there a single California case holding that such a RICO claim would not fall within one or more of the various recognized exceptions to the WCAB's exclusive jurisdiction. The idiosyncracies of California's workers' compensation scheme make this case an inappropriate vehicle to address the general question of the degree to which insurance law preempts RICO under the McCarran-Ferguson Act.

Second, independently of whether the court below applied the proper test for whether the RICO claims would invalidate, impair or supersede California law, the decision below reached the correct result because Petitioners did not satisfy another of the McCarran-Ferguson Act's four prongs.

A claim is subject to preemption only if all four prongs of the McCarran-Ferguson Act are met. *SEC v. National Securities, Inc.*, 393 U.S. 453, 459-61 (1969); *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d at 1489. Contrary to Petitioner's mischaracterization (Petition at p. 14), the court below did not consider or determine whether any of the other three prongs had been met. Finding that, under the controlling authority of *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, the RICO claims would not invalidate, impair or supersede California law, the court below did not go further in its inquiry.

It is apparent that Petitioners also did not meet their burden with respect to at least one other prong as the fraudulent conduct underlying Respondent's RICO claims does not constitute the "business of insurance" within the meaning of the McCarran-

Ferguson Act. A district court must analyze three factors to determine whether activity constitutes the business of insurance:

> *First*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 48 (1987); *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982); *Serrato v. John Hancock Life Ins.*, 31 F.3d 882, 885 (9th Cir. 1994); *Phoenix Mut. Life Ins. Co. v. Adams*, 30 F.3d 554, 560 (9th Cir. 1994).

Under this analysis, activities involving the relationship between the insurer and policyholder and affecting whether the policyholder would receive the benefits of performance of the insurance contract have been found to constitute the "business of insurance." *United States Dept. of Treasury v. Fabe*, 508 U.S. 491, 501 (1993) (the liquidation of an insurer and distribution of assets to policyholders); *LeDuc v. Kentucky Cent. Life Ins. Co.*, 814 F. Supp. 820, 826-27 (N.D. Cal. 1992) (the use of fraudulent financial statements to induce agents to sell insurance policies.)

Conversely, activities which are not an integral part of the policy relationship between insurer and insured or which occur outside the insurance industry have been held not to constitute the "business of insurance." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. at 48, (holding that bad faith by an insurer is not the "business of insurance"); *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. at 129 (holding that the use of a peer review committee

to advise an insurer as to whether charges for chiropractic services were reasonable and necessary is not part of the "business of insurance"); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 213-14 (1979), *reh'g denied*, 441 U.S. 917 (1979) (holding that an insurer's agreement with participating pharmacies to provide benefits to policyholders was not part of the "business of insurance"); *Thacker v. New York Life Ins. Co.*, 796 F. Supp. 1338, 1342 (E.D. Cal. 1992) (holding that mail fraud in violation of federal RICO laws "deals not with the business of insurance, but with conduct wholly divorced from what is ordinarily viewed as 'the business of insurance' ".)

Applying this tripartite test, the conduct by Petitioners which gives rise to the RICO claims clearly does not constitute the "business of insurance." Mail fraud does not transfer or spread a policyholder's risk. Petitioners are not policyholders; they are strangers to the policy who have chosen Respondent and its insureds as their victim. The risk against which Respondent's policyholders have insured is injury or illness to their employees in the workplace, not mail fraud. The submission and prosecution of fraudulent claims and related medical and legal bills and requests for liens does not transfer or spread the risk to employers of injury or illness to their employees. Rather, such a pattern of racketeering injures Respondent's business and property.

Mail fraud is not an integral part of the policy relationship between the insurer and the insured. It is a criminal aberration which victimizes both the insurer and the insured. *Thacker v. New York Life Ins. Co.*, 796 F. Supp. at 1342, therefore is controlling. Just as arson is not an integral part of the relationship between a property and casualty insurer and its policyholder and bank robbery is not an integral part of the relationship between a bank and its depositor, mail fraud in violation of the

RICO laws "deals not with the business of insurance, but with conduct wholly divorced from what is ordinarily viewed as 'the business of insurance.' "

Examination of the third factor, whether the practice is limited to entities within the insurance industry, also compels the conclusion that the alleged mail fraud does not constitute the "business of insurance." Petitioners are not in the insurance industry. They are a doctor, his medical corporation, a lawyer, his law corporation, the administrator of the medical and law corporations and his two companies. Mail fraud generally is not limited to the insurance industry. Moreover, the victims who are insured by Respondent also are not "within the insurance industry;" they are engaged in a wide range of activities, including restaurants, electrical contractors, dentists, beauty suppliers, yacht clubs, automobile dealerships, hotels and manufacturers.

The fact that one victim, Respondent, transacts insurance business does not insulate Petitioners from civil liability for their RICO violations. As the court below observed in *United States v. Title Ins. Rating Bureau, Inc.*, 700 F.2d 1247, 1249-50 (9th Cir. 1983), *cert. denied*, 467 U.S. 1240 (1984), the McCarran-Ferguson act is to be narrowly construed and "exempts the 'business of insurance' and not the 'business of insurance companies.' "

The court below's decision would be an inappropriate vehicle for reviewing any purported differences in the interpretation or application of the "invalidate, impair or supersede" prong of the McCarran-Ferguson Act. Whether the court below properly interpreted the "invalidate, impair or supersede" prong is irrelevant since: (i) under California law, Respondent's RICO claims would not be precluded by the WCAB's exclusive jurisdiction; and (ii) Petitioners did not

satisfy the "business of insurance" prong. Accordingly, the petition should be denied.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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